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No. 06-40

In the

Supreme Court of the United States

EUGENE EVANS,

Petitioner,

v.

CITY OF BERKELEY, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to Supreme Court of California

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Eugene Evans (Evans) files this reply to address the new issues raised in Respondent City of Berkeley's (City or Berkeley) Brief in Opposition (Opp.)

I

THE DAMAGES IN THIS CASE WERE SUFFERED BY EVANS; HE THEREFORE HAS STANDING TO BRING THIS CASE

City claims that the injuries alleged were suffered by a nonparty, the Boy Scouts of America (BSA), not Evans, and therefore Evans has not suffered the "injury in fact" required for Article III standing. Opp. at 9-14. Specifically, City claims that the action sought to recover the described damages to the BSA program, not to any individual participant. Opp. at 8. The First Amended Complaint (Complaint) however, makes plain the injuries in fact were suffered by, and damages sought on behalf of, the individual plaintiffs, including Evans. The Complaint declares that the plaintiffs, including Evans, "sue individually as well as for the benefit of all Berkeley Sea Scout program participants on the interests and issues alleged in this Complaint that are common to them all." Para. 12, App. D-8. No claim is made on behalf of BSA.

Complaint Paragraph 11 sets out the specific injuries.

> Each of the Plaintiffs has suffered injuries as a result of the actions of Defendants. These injuries include, inter alia, the unlawful discrimination against them by the Defendants including interference with and attempted interference with their First Amendment rights of freedom of association and freedom of speech, the threatened loss of the Northland ship to the Boy Scouts of America if plaintiffs complied with the demands of Defendants, loss of membership in the BERKELEY SEA SCOUTS due to an

> inability to pay the $7 membership fee formerly paid by the Skipper EUGENE EVANS who now pays over $500 per month in berth fees, a disintegration of the community outreach program due to a lack of funds, a general disintegration and scaling back of the program due to a lack of funds, a loss of formerly free services and events (such as cruises, meals, beverages and overnight camping trips) formerly paid for by the Skipper EUGENE EVANS who can no longer afford them, a diminished use of the Farallon ship for cruises due to a lack of funds, the threatened loss of maritime liability insurance made available at a greatly reduced rate from the Boy Scouts of America if plaintiffs complied with the demands of Defendants, and the continuing loss each month for berth fees of over $500 per month at this time.

App. D-6-D-7.

All of these injuries are those of the individual Sea Scouts, and particularly Petitioner Evans who is now paying for the formerly free berth fees, *id.*, and not of BSA. (As the court below noted, BSA provides the Sea Scouts with a low-cost maritime liability insurance policy but gives it no direct funding. App. A-2-A-3.) All of these allegations of injury are incorporated into the Fifth Cause of Action for Violation of Constitutional Rights. App. D-48.

City claims the free berth benefit was issued to BSA's Mount Diablo Council under the City Council's 1989 resolution, citing its App. F. Opp. at 7. In fact, App. F shows the resolution was adopted June 28, 1969, not 1989. More recent documentation in App. K, Minutes of May 5, 1998, shows the action of the City Council was to deny free berths to the Sea Scouts, not BSA.

See also, the City Attorney Opinion concluding that the Berkeley Sea Scouts do not qualify as an organization entitled to free berths under City Council's policy. App. J-6. These City records make clear that the applicants for the continuing free berth benefits were the Sea Scouts, rather than BSA.

City attempts to support its attack on Evans' standing by citing, Opp. 9-10, 27, to *DaimlerChrysler Corp. v. Cuno*, ___ U.S. ___, 126 S. Ct. 1854 (2006). City neglects to note that this was a taxpayer standing case in which this Court held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *Id.* at 1864. The present case, of course, is not a taxpayer case, but one of direct out of pocket injury in fact to Evans.

Evans, in sustaining the damages noted above, has met the tripartite test as set forth in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998). These include injury in fact, the cost of personally paying the formerly free berth fees among other harm, causation by the City in its revocation of the free berths formerly provided to the Sea Scouts, and redressability through repayment of those fees and other damages, *see* App. D-6-D-7, D-53-D-54.

II

CITY'S CONDUCT IN REVOKING THE FREE BERTHS CONSTITUTED VIEWPOINT DISCRIMINATION AND VIOLATION OF FREEDOM OF ASSOCIATION

A. City Concedes That Evans and BSA Have the Same Viewpoint

City argues that Evans has no standing to raise the issues of freedom of association and viewpoint discrimination. City claims that City's policy supports and does not burden Evans' viewpoint since he favors the inclusion of gays and atheists in

the Sea Scouts. Opp. at 21-23. City then contradicts this argument by stating that the Sea Scouts and BSA were "one and the same" with respect to the discrimination at issue. Opp. at 17. City further notes the California Supreme Court finding that the Sea Scouts could not, consistent with BSA limitations imposed on them, state that they would not discriminate against gays and atheists. *Id.* (citing App. A-20).

What is at issue here is City's action in revoking free berthing for the Sea Scouts because of their relationship to BSA and the ensuing damages to Evans and the Sea Scouts he represents. The viewpoint of Evans at issue here is his adherence to BSA doctrines. As City points out, Opp. at 17, Evans' and BSA's viewpoint is "one and the same" with regard to the policy on homosexuality and atheism. If it were not so, that is, if the Sea Scouts had agreed to a policy that would have put them at odds with the BSA policy, there would be nothing to litigate because Berkeley would not have excluded the Sea Scouts from the free-berthing program.

Further, the activities of Evans in promoting the skills associated with sailing in this context are indeed expressive activity. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649-50 (2000), found expressive activity included teaching such skills as camping, archery, and fishing. Further, "the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 650. The City denied free berths to the Sea Scouts on the basis that they were associated with BSA. App. A-6-A-7. In seeking to separate Evans and the Sea Scouts from BSA, the City violated these rights of expressive association.

B. City Has Shown No Compelling Interest in Infringing on Petitioner's Viewpoint

City criticizes Evans' "gratuitous references to 20 U.S.C. § 7905, 42 U.S.C. § 5309 and sections of the California Government and Revenue and Taxation Codes" claiming that "[n]one of the cited section[s] have ever been at issue in this case before any court, including the California Supreme Court." Opp. at 21 n.2. City claims "Evans' reference to them is improper and should be disregarded." *Id.* City's claim is incorrect. As City must be aware, Evans cited and relied on most of these sections in his Petitioners' Opening Brief on the Merits in the California Supreme Court as follows: 20 U.S.C. § 7905 at 28; Cal. Gov't Code § 53077.5(b) and (a)(5) [mistakenly cited as (b)(5) in the Petition] at 31; Cal. Rev. & Tax. Code § 214(a) at 31; and Cal. Rev. & Tax. Code § 6361(b)(3) at 32. Evans did not cite therein 42 U.S.C. § 5309(e) which was enacted December 30, 2005, P.L. 109-148, 119 Stat. 2680, after briefing in the California Supreme Court was completed. Evans cites these sections here for the same reason he cited them to the lower court, that is, to show that the Boy Scouts, including its subsidiaries such as the Sea Scouts, are federally and state recognized charitable organizations that are statutorily approved.

Moreover, these statutes are fundamentally important to demonstrate that Berkeley's viewpoint discrimination, infringing on the First Amendment and on Equal Protection, is not justified and permitted by a compelling state interest. This Court, in *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983), made it clear that viewpoint discrimination, in the sense of withholding a generally available benefit or subsidy on the basis of an organization's expressive activity, can be allowed only where "there can be no doubt that the activity involved is contrary to *a fundamental public policy.*" (Emphasis added.) In *Bob Jones*, this Court recognized the long-established "fundamental national public policy," embraced by all three

branches of the federal government, of opposition to race-based discrimination. *Bob Jones Univ.*, 461 U.S. at 593. Likewise, with reference to the sex-based discrimination at issue in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (cited by the City, Opp. at 24, 25), Title IX's promotion of women athletics arguably evidences a fundamental national policy that would justify viewpoint-based discrimination in public subsidies in that context.

There is no such "fundamental national public policy" at odds with the Boy Scouts or the BSA viewpoints that trigger Berkeley's discrimination against the Sea Scouts. To the contrary, the Boy Scouts have been honored by the federal government as a federally chartered organization (*see Marcella v. Brandywine Hosp.*, 47 F.3d 618, 624 (3d Cir. 1995)), and they enjoy tax-exempt status under both the federal code (*see* I.R.S. Publication 78, Cumulative List of Organizations, listing 501(c)(3) organizations) and California state law (*see* Cal. Rev. & Tax. Code § 214(a)).

Indeed, Congress' enactment in 2005 of 42 U.S.C. § 5309(e), withholding certain federal funds from any locality that would deny equal access to public facilities for the Scouts, is of even greater significance in the wake of Justice Kennedy's recent stay in the case of the Mt. Soledad memorial in San Diego County. Noting that Congress had acted to attempt to spare the memorial from court-ordered demolition, Justice Kennedy wrote: "Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order." *San Diegans For the Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S. Ct. 2856, 2858 (2006). If Congress' weighing in on behalf of the Mt. Soledad memorial increased the likelihood of an eventual hearing by this Court, then Congress' legislating to guarantee equal access for the Boy Scouts should be regarded as an argument for granting

certiorari in this, a case challenging denial of equal access to a Scouting affiliate.

C. Viewpoint Bias Is Barred Even in a Nonpublic Forum

Berkeley contends that Evans has denied that this is a "public forum" case. Opp. at 26, n.3. While Evans counsel, at argument before the California Supreme Court, did agree that the free-berthing program is not a public forum, this applies only to an *unlimited* public forum. In contrast, a program to facilitate the sailing activities of nonprofit organizations constitutes a quintessential *limited* public forum. Indeed, this is consistent with the teaching of this Court that recreational activities—such as "the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Dale*, 530 U.S. at 650 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984)).

In any case, viewpoint bias is barred even in a *nonpublic* forum. Government needs only reasonable grounds for restrictions in a nonpublic forum, but they must be "reasonable . . . and . . . *viewpoint neutral*." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). Therefore, regardless of the category of the forum at issue, Berkeley has transgressed by engaging in viewpoint discrimination.

III

CITY'S DENIAL OF EQUAL ACCESS TO ITS PUBLIC FACILITY WAS DENIAL OF A PUBLIC BENEFIT, NOT A SUBSIDY

City misquotes the Petition as stating that " 'no other subsidy applicant was required to submit a letter' such as the April 8, 1998 letter. Petition p.19." The sentence in fact reads:

"No other free-berth applicant at the Berkeley Marina was required to submit such a letter." Petition at 19. The distinction is important. This Court has never considered equal access to public facilities for the purpose of expressive activities to be a "subsidy." Rather, it has recognized that equal access to government facilities is more properly characterized as a government benefit that cannot be denied on the basis of activity protected by the First Amendment. In *Healy v. James*, 408 U.S. 169 (1972), this Court found that "the primary impediment to free association flowing from nonrecognition [was] the denial of use of campus facilities for meetings and other appropriate purposes." *Id.* at 181. The recent case of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, ___ U.S. ___, 126 S. Ct. 1297 (2006) characterized *Healy* as holding that it is unconstitutional to "impose penalties or withhold *benefits* based on membership in a disfavored group." *Id.* at 1312 (emphasis added). This Court noted the distinction in the grant of funds by government, a subsidy, and "allocating public benefits, such as access to a school auditorium or a municipal theater" in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), or the second class mailing privileges available to "'all newspapers and other periodical publications,'" in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 n.1 (1946). Granting similar nonprofit public benefit organizations free access to public facilities is a public benefit, not a subsidy.

For this reason, City's and the court below's reliance on cases providing for actual funding or subsidies is incorrect. Those cases can be described as involving a subsidy in that they involved a payment of government funds or the provision of a tax exemption. Thus, the issue of *Locke v. Davey*, 540 U.S. 712 (2004), was the payment of state funds for religious studies; *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003),

involved federal funds to improve internet communications; *Finley*, 524 U.S. 569, involved federally funded grants to artists; and *Rust v. Sullivan*, 500 U.S. 173 (1991), involved federal funds for a counseling program that was intended to provide a government message to patients. Here, Berkeley was not providing funds to Evans or the Sea Scouts. It had been merely granting them access to use of the Marina on the same basis it provides to other nonprofit organizations.

City purports to quote Evans as conceding "that a funding condition is permissible 'when the government institutes a program or subsidy as an instrument of its own message or to perform governmental functions.' Petition p.13." Opp. at 27. The Petition does not contain this language. Rather, it notes "the very specific situation where the government has established a program or a funding arrangement by which the government '*itself* speak[s] or subsidize[s] transmittal of a message.' Petition at 13, citations omitted." The City cannot pretend it is speaking itself or subsidizing transmittal of messages of nondiscrimination by the Nautilus Institute, Cal Sailing Club, and the Berkeley Yacht Club, those organizations to which it granted free berths. App. D-21. Rather, it is merely providing for recreational opportunities in the Berkeley Marina. City is thus in the same position as that of the government in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), which held that the government could not condition grants to lawyers for indigent clients on their agreement to refrain from challenging the constitutionality of welfare laws, since the grant program was not designed "to promote a governmental message." *Id.* at 534.

This is not a case where private actors are stepping into the City's shoes and performing, as contractors, government functions such as street sweeping, garbage collection, or some other activity serving the public generally. Each of the non-profit organizations that has received free berthing since the policy was adopted—the Berkeley Yacht Club, the Cal Sailing

Club, the Nautilus Institute, and the Berkeley Sea Scouts (App. D-21)—has its own purpose for using the Marina and its own members and defined constituency. None is a general-service organization operating as a public contractor or an intermediary between the city and the general public.

For this reason, the free-berthing-for-non-profits program must be recognized as a program and benefit *for non-profit organizations*—allowing such organizations to use a city facility for their own organizational purposes. It follows that Berkeley's decision as to whether to grant or deny a non-profit organization equal access to this program must be analyzed in the light of this Court's precedents forbidding viewpoint discrimination and ideological considerations in making public facilities, programs, or benefits available. Berkeley fails this test.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court grant the Petition and hear the important First Amendment and Equal Protection issues raised by this case.

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